Supreme Court, U.S.
FILED
APR 4 2001
CLERK

(4)

No. 00-1025

IN THE

Supreme Court of the United States

TOWN OF NORWOOD, MASSACHUSETTS,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF OF PETITIONER

CHARLES F. WHEATLEY, JR.
WHEATLEY & RANQUIST,
34 Defense Street
Annapolis, Maryland 21401
(410) 266-7524

KENNETH M. BARNA
ALAN K. POSNER
RUBIN & RUDMAN
50 Rowes Wharf
Boston, Massachusetts 02110
(617) 330-7000

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
JENNIFER M. RUBIN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

April 4, 2001

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

13pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

American Tel. & Tel. Co. v. *Central Office Tel., Inc.*, 524 U.S. 214 (1998) 2, 8
Arkansas Louisiana Gas Co. v. *Hall*, 453 U.S. 571 (1981) 2, 3, 4, 6
Consolidated Edison Co. v. *FERC*, 958 F.2d 429 (D.C. Cir. 1992) 2
Episcopal Theological Sem'y v. *FPC*, 269 F.2d 228 (D.C. Cir. 1959) 5
Maislin Indus., U.S., Inc. v. *Primary Steel, Inc.*, 497 U.S. 116 (1990) 7
Towns of Concord & Wellesley, Mass. v. *FERC*, 844 F.2d 891 (1st Cir. 1988) 4
Transwestern Pipeline Co. v. *FERC*, 897 F.2d 570 (D.C. Cir. 1990) 4

STATUTE AND REGULATION

16 U.S.C. § 824d 3, 5, 8, 9
18 C.F.R. § 35.1 ..... 3, 8

IN THE

Supreme Court of the United States

No. 00-1025

TOWN OF NORWOOD, MASSACHUSETTS,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF OF PETITIONER

INTRODUCTION

In its petition for certiorari, Town of Norwood, Massachusetts ("Norwood") raised an important question regarding the Federal Energy Regulatory Commission's ("FERC" or "Commission") decision to disregard the filed-rate doctrine in giving effect to an unfiled contract affecting the terms of the electrical service provided to Norwood by New England Power Company ("NEPCO"). Specifically, Norwood challenged FERC's determination that an unfiled ten-year extension of a power contract may be enforced, simply because a filed contract contains an option to extend.

This holding is flatly inconsistent with the filed-rate doctrine. When a filed contract contains an option affecting rates that may or may not be exercised, a party's decision to exercise the option creates a new contract that unquestionably must be

filed to be enforced. FERC's decision not to apply the filed-rate doctrine to the new contract here – either because the filed contract indicated that extension was an option or because the option pertained only to contract duration – is inconsistent with established authority. See *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981) ("*Arkla*"); *American Tel. & Tel. Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214 (1998) ("*Central Office Telephone*"). It also contravenes the primary purposes of the filed-rate doctrine – ensuring that all rate-related information is public in order to "promote[] certainty in the market, discourage[] undesirable price discrimination, and preserve[] the regulator's authority to determine at the threshold whether particular rates or practices are unlawful." *Consolidated Edison Co.* v. *FERC*, 958 F.2d 429, 432 (D.C. Cir. 1992).

Because numerous power contracts contain options that affect rates and rate-related terms, the question raised is a significant one with wide-ranging application across the field of electrical regulation and, indeed, "across the spectrum of regulated utilities." *Arkla*, 453 U.S. at 577. In this period of deregulation, it is particularly critical that this Court ensure that FERC uphold the filed-rate doctrine, as embodied in 16 U.S.C. § 824d and in such cases as *Arkla* and *Central Office Telephone*. Accordingly, the Court should grant Norwood's petition for certiorari and reject the Commission's attempts to abandon the filed-rate obligations placed on it by its governing statute and this Court's precedents.

ARGUMENT

1. The opposition briefs do not dispute that the exercising of the option to extend the power contract at issue for ten years constituted a contract between Norwood and NEPCO. Instead, they maintain that the filing of the original contract containing the *option* to extend fulfilled all filing requirements not only for the original contract, but also for the new contract

created when Norwood exercised the option. According to FERC and NEPCO, the Commission is free to ignore the filing requirements under 16 U.S.C. § 824d and its accompanying regulation, 18 C.F.R. § 35.1, for *any* contracts exercising a previously filed option. This claim, and its application in this case, is flatly inconsistent with this Court's decision in *Arkla*.

In *Arkla*, this Court concluded that a customer could not enforce a "favored nations" clause that was included in a contract on file with, and approved by, the Commission. 453 U.S. at 582. In rejecting enforcement of that clause despite its presence in an approved agreement, the Court made clear that "where there is a conflict between the filed rate and the contract rate, the filed rate controls." *Id.*

FERC asserts that *Arkla* is not on point here, because there the contract "require[d] the utility to replace the filed rate with a new, but unspecified rate," while here "the Commission approved petitioner's option to extend the contract termination date in 10-year increments when it accepted the 1989 contract amendment," FERC Opp. at 8. See *id.* at 9 ("the Commission's approval of the 1989 contract amendment constituted approval of the optional contract extension"). This is no distinction at all. In *Arkla*, as here, the Commission approved and had on file a contract that recognized the possibility (not a certainty) that a critical term of the contract might change – in *Arkla*, the rate, and here, the duration. And, despite the fact that the filed, approved contract acknowledged such a possibility in *Arkla*, this Court held that the *implementation* of the most-favored nations clause had to be filed to be enforced. Similarly here, although the filed contract contained an option for its extension, the exercising of that option constituted a new contract that had to be filed to be enforced. The Commission's approval of a contract containing an option does not constitute approval of the

option's exercise, and, most certainly, does not constitute the filing of the new contract created by exercise of the option.[1]

At the heart of FERC's argument is its belief that rates per se are more important than rate-related items such as the duration of the agreement, for this is the only true distinction between *Arkla* and the instant case – that the option in the former directly affected rates while the option here pertains to contract length. But that argument is, as FERC recognizes (Opp. at 9), precluded by *Central Office Telephone* and thus cannot be openly stated. Both the First Circuit and the Commission contravened *Arkla* by giving effect to an unfiled contract that altered a central term of the filed rate. See also Petition at 11-12 (describing lower court decisions making clear that when a filed contract contains either "favored nations" or price escalation clauses, changes pursuant to such provisions must be filed to be enforced).

2. The opposition briefs' arguments, like the decisions below, simply blur the established distinction between automatic rate changes, which generally do not require a new filing to be effective, and exercises of options, which are not automatic and thus do require a filing to be effective. Petition at 15. Far from responding to this claim, the Commission and NEPCO attempt to justify the First Circuit's decision by further confusing the issue. See FERC Opp. at 10 (citing use of rate formula);[2] NEPCO Opp. at 11 (citing market-based

---

[1] While the "Act" vindicated in *Arkla* was the Natural Gas Act, *Arkla* makes clear that its principles are equally applicable to cases arising under the Federal Power Act. 453 U.S. at 577 n.7.

[2] *Towns of Concord & Wellesley, Mass.* v. *FERC*, cited by FERC, is particularly inapposite, for it addresses a contract with an automatic adjustment clause expressly authorized under 16 U.S.C. § 824d(f). 844 F.2d 891, 896 (1st Cir. 1988); *see also Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570, 573 (D.C. Cir. 1990) (addressing FERC regulations dealing with pipelines' abilities to pass on costs to customers under the Natural Gas Act). Beyond setting forth procedural requirements that

rates). However, the distinction between automatic and non-automatic rate and rate-related changes is a crucial one. To be sure, a customer reviewing its utility's files could determine whether automatic rate changes have been triggered, but that customer would have no way of knowing whether an option has been exercised unless the filing requirement is consistently applied to options.

At no point does either opposition brief challenge the logic of this distinction. Rather, NEPCO complains that a decision reversing the First Circuit would endanger its ability to enforce a wide range of options without having to file option exercises. .NEPCO Opp. at 9-11. But this merely begs the question and illustrates the widespread nature of the problem at issue – and the importance of deciding now, in this case, whether public utilities will be permitted to effect expansive changes to their filed rates without following the filing requirements found in § 824d.

FERC dismisses the lower court decisions cited by Norwood in its Petition as old and "to the same effect as *Arkla*." FERC Opp. at 8 n.3. Norwood agrees; these cases reflect an old, well-established rule that even where a filed, approved contract contains provisions that recognize the possibility of altered rates and rate-related terms in the future, such alterations must be filed to be enforced. The application of that rule would have required the filing of the contract extension at issue here. The Commission also attempts to distinguish the remaining case, *Episcopal Theological Seminary* v. *FPC*, 269 F.2d 228 (D.C. Cir. 1959), because it

---

must be met for such automatic rate adjustments, *see* 16 U.S.C. § 824d(f)(1)-(3), § 824d(f) specifically limits the term "'automatic adjustment clause'" to "a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates *reflecting increases or decreases (or both) in costs* incurred by an electric utility," *id.* § 824d(f)(4) (emphasis supplied). Thus, § 824d(f) does not apply to this case.

"upheld application of a Federal Power Commission regulation under which every rate change was deemed to be a change in the rate schedule, which required refiling." FERC Opp. at 8 n.3. But that regulation is entirely consistent with the filed-rate doctrine, which requires the filing of rates and rate-related terms, while the decision under review – allowing enforcement of unfiled changes to the duration of a rate – is flatly contrary to the doctrine.[3]

In sum, Norwood agrees that when a filed, approved contract provides for automatic rate and rate-related adjustments, no new filing is required when such an adjustment occurs. But where, as here, a filed, approved contract simply creates an rate or rate-related option that may or may not be exercised, the implementation of the option must be filed in order to be enforced. FERC's contrary argument effectively assumes that there is a category of changes that alter the terms and conditions of the filed rate but nonetheless need not be filed. That core assumption, upheld by the First Circuit in this case, contradicts and undermines this Court's precedents and the filed-rate doctrine.

---

[3] In an argument unsupported by FERC, NEPCO argues in the alternative that a change in a utility contract instituted unilaterally by a customer is per se outside of the reach of the filed rate doctrine. NEPCO Opp. at 4-5, 10. This argument is plainly baseless for several reasons. First, the change at issue here was not unilateral; it was the product of a contract between the customer and the utility and thus well within the coverage of the filed-rate doctrine. *See* Petition at 10. In any event, the argument is in substantial tension with both *Arkla*, where a *customer* sought to enforce a provision of its filed contract, 453 U.S. at 573-74, and the language of § 824d. Further, it lacks any logical stopping point and could ultimately permit the Commission to dispense with filing obligations for all aspects of electrical service after a public utility and customer have filed an initial contract. The court below did not rule on this ground; the government does not embrace it; it lacks merit; and it should not be decided in this case.

3. Contrary to NEPCO's suggestion, this case implicates the principles protected by this Court's filed-rate doctrine decisions. As this Court's jurisprudence makes clear, the filed-rate doctrine promotes certainty for purchasers of regulated services and products, such as electrical power; ensures that customers can review the Commission's files and determine the terms under which those services and products are being provided; and protects against discrimination. See Petition at 14, 16. The decision at issue in this petition undermines each of these salutary principles. *Arkla, Central Office Telephone*, and *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 130 (1990) drew a bright line: purchasers and end users are entitled to rely *solely* on the contracts that are on file with the Commission. By giving effect to a secret, unfiled agreement, the First Circuit blurred that bright line, causing uncertainty for purchasers, like Norwood, and for customers and other persons who review FERC's files in order to ascertain the terms under which a distributor receives electrical power service.

FERC effectively concedes that the purposes of the filed-rate doctrine mandate that the public be able to determine the duration of a power contract from the filed contract. It nonetheless makes two arguments that the petition should not be granted.

First, the Commission contends that this case would be a poor vehicle to address the question presented, because the public "at all times" could have deduced from the absence of a termination notice in the file that the parties had decided to extend the contract. FERC Opp. at 10.[4] This argument is demonstrably wrong, and ironically so. There is a clear end date on the 1983 Contract – October 31, 1998; and on file with FERC is a contract between Norwood and a *second*

---

[4] Notably, neither FERC nor the court of appeals made such a finding in their opinions in this case.

utility pursuant to which the latter is providing electrical power service to Norwood. In fact, the contract extension is not in effect, and the contract at issue has been terminated.

Indeed, by permitting NEPCO to decide which unfiled document it will enforce – the 1990 Letter exercising the option or the notice of termination (and withdrawal of the 1990 Letter) – the decision below opens the door to discrimination. NEPCO decided to try to enforce the unfiled 1990 Letter, but it could just as easily instead have filed the notice of termination, without bringing the 1990 Letter to the attention of the Commission.[5] Thus, pursuant to the decisions under review, public utilities, like NEPCO, have discretion to treat similarly situated purchasers differently – the essence of unlawful discrimination. *Central Office Telephone*, 524 U.S. at 223.[6]

---

[5] In light of the current deregulation of the energy field, one could easily envision such differential treatment being accorded to a producer-parent's distributor-affiliate.

[6] Indeed, it is undisputed that Norwood has given NEPCO written notice of termination (with a withdrawal of the 1990 Letter). Thus, FERC's contention – that the notice is not in the file – simply demonstrates that the Commission has permitted NEPCO to fail to file *two* documents "affect[ing] or relat[ing] to [the] rates, charges, classifications, and services," 16 U.S.C. § 824d(c), under the 1983 Contract – violations of the statute and the filed rate doctrine that have inured entirely to the benefit of NEPCO and to the detriment of Norwood. FERC's position further illustrates the risks inherent in permitting it to pick and choose what contracts it will or will not enforce without filing pursuant to § 824d. Under the Commission's argument, an unfiled notice of termination is ineffective – even if the distributor seeking to terminate has faithfully followed the filed contract's requirements for termination. *See id.* § 824d (requiring "public utilit[ies]" to file contracts and not providing means for distributor to file such contracts); 18 C.F.R. § 35.1 (same). Yet in this case the Commission deemed effective an unfiled notice of extension. This disparate treatment, and the enormous advantage that it provides to producers like NEPCO, unjustifiably does serious harm to the filed-rate requirements of § 824d.

Second, FERC argues that "there always have been 'gaps in what could be gleaned from Commission filings.'" FERC Opp. at 10 (citing Pet. App. 9a-10a). But in support of that argument FERC cites two cases in which courts of appeals held that contracts expressly providing for future occurrences (*i.e.*, termination as of a particular date and a rate adjustment pursuant to a formula) could be enforced. The cases, and hence the Commission's argument have no application where, as here, the contract contains an *option.*

In short, this case provides a particularly clear factual situation against which to assess the question presented. Neither the Commission nor NEPCO challenges the fact that the July 25, 1990 letter by which Norwood sought to exercise an option to extend the term of its 1983 electrical service contract with NEPCO was a contract under generally applicable contract law. And all parties agree that the 1990 Letter, by purporting to extend the term of the 1983 Contract, is a "contract[] which in any manner affect[s] or relate[s] to [the] rates, charges, classifications, and services," 16 U.S.C. § 824d, provided by NEPCO to Norwood under the 1983 Contract. Finally, it is likewise undisputed that NEPCO failed to file the 1990 Letter,[7] but the Commission nevertheless gave effect to that unfiled document and permitted NEPCO to extend the 1983 Contract and reap millions of dollars in profits from Norwood for electrical power that NEPCO will never provide.

These undisputed facts present a purely legal question for this Court's resolution – to wit, whether the Commission, having permitted the filing of a contract authorizing an option,

---

[7] NEPCO attempts to argue away its failure to file by stating that it did not need to file the 1990 Letter until 60 days before it became "effective" on November 1, 1998. NEPCO Opp. at 11 n.8. Beyond the fact that the 1990 Letter has never been filed, *see* FERC Opp. at 9-10, this argument ignores the fact that NEPCO sought a determination, granted by FERC, that the 1990 Letter was *binding* on Norwood.

can authorize enforcement of an unfiled document exercising that option.

* * * *

Both Norwood and FERC have highlighted the fact that the electrical industry is currently undergoing deregulation. See Petition at 16; FERC Opp. at 10 n.4. This is indeed a critical time in the electrical industry. Permitting public utilities to evade their filing requirements at this time puts at risk the interests of electric power distributors and end-use consumers alike. The filed-rate doctrine has historically ensured that consumers and agencies have the information necessary to protect the public interests, to avoid discrimination, and to vindicate the federal statutes that agencies enforce. This Court should act now to ensure that the filed-rate doctrine retains its strength and vitality in the face of the contrary agency and lower court decisions below.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES F. WHEATLEY, JR.
WHEATLEY & RANQUIST
34 Defense Street
Annapolis, Maryland 21401
(301) 262-8608

KENNETH M. BARNA
ALAN K. POSNER
RUBIN & RUDMAN
50 Rowes Wharf
Boston, Massachusetts 02110
(617) 330-7000

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
JENNIFER M. RUBIN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

April 4, 2001

* Counsel of Record